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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

Conservatorship of the Person and Estate
of DOUGLAS N.

LINDA H., as Conservator, etc.,
Petitioner and Appellant,

v.

DENIS ZILAFF, as Public Guardian, etc.,
Objector and Respondent;

DOUGLAS N.,
Appellant.

C057603

(Super. Ct. No. LPR97681)

Douglas N. (conservatee) and his mother, Linda H. (conservator) appeal from an order regarding placement of Douglas at Napa State Hospital (NSH). (Welf. & Inst. Code, § 5358 et seq.)¹ Douglas contends trial counsel's failure to secure the preparation of a reporter's transcript of the

¹ Undesignated statutory references are to the Welfare and Institutions Code.

placement hearing constitutes prejudicial ineffective assistance of counsel, and claims that subsequent proceedings have not rendered his appeal moot. Linda joins in those claims, and further contends that NSH is not a suitable placement for Douglas. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Douglas has an extensive history of mental disorders, beginning with his admission to the Sacramento County Mental Health Treatment Center (SCMHTC) in 1984 at the age of 17. Douglas was found to be "gravely disabled" within the meaning of the Lanterman-Petris-Short Act (§ 5000 et seq.) and the public guardian was appointed as conservator of his person and estate.

Douglas was admitted to a locked residential facility in January of 1987. He left twice, and was thereafter readmitted to SCMHTC. From there, he was admitted to Crestwood Manner Sacramento in August of 1987, where he lived for two and a half years. However, after leaving five times, he was not allowed to return and, in January of 2000, was referred to Crestwood Modesto. He was returned to SCMHTC shortly thereafter "due to highly aggressive behavior and poor medication compliance." Douglas was readmitted to Crestwood Modesto for a brief period in May of 2000, then returned to SCMHTC and thereafter was referred to Napa State Hospital (NSH) in September 2000.

Linda H. was appointed Douglas's successor conservator in March 2002.

Douglas lived at NSH until June of 2004, when he was returned to SCMHTC due to Linda's failure to renew his conservatorship. Sometime thereafter, Linda was reappointed as Douglas's conservator.² Linda felt Douglas was deteriorating at NSH and insisted he be placed in community placements.

On September 27, 2006, the County of Sacramento sent a letter to Linda informing her that Douglas was "no longer in need of, or appropriate for, the acute care and treatment provided at [SCMHTC]," and notifying her of the need to find alternative placement. The County also expressed its continuing opinion that Douglas be placed at NSH, noting that "exhaustive efforts have been repeatedly made toward placement at lesser levels of intensive restrictiveness, and all such efforts have been deemed unsuccessful. [Douglas] has been denied admission to all local locked community placements considered appropriate for referral." At Linda's request, the County provided a list of augmented care and treatment (ACT) board and care homes, but advised that the "ACT level of care is not clinically indicated" and thus not recommended by the County.

Despite referrals to numerous facilities, Douglas was denied admission by all due to his previous behaviors and his need for a level of care which the respective facilities were

² The County of Sacramento requested that we take judicial notice of an order in the above proceeding entered March 19, 2009, indicating the public guardian of the County of Sacramento has been reappointed the conservator of the person and estate of Douglas N. We deny the request for judicial notice.

unable to provide. A September 27, 2007, report authored by Kelli Weaver, Program Coordinator at SCMHTC, identified some of Douglas's behaviors as follows: violence towards others, impulsivity, propensity towards aggression, medication noncompliance, numerous incidents of elopement, noncompliance with staff direction, stealing from peers, verbal and physical threats towards staff and vulnerable peers, intrusiveness and unpredictability, polysubstance abuse, destruction of property and intimidation of staff and peers. At Linda's request, Douglas was referred to Turning Point, an agency providing full-time intensive services, supervision and intervention. However, Douglas's "behaviors were not successfully managed" there.

In April of 2007, Linda toured NSH to determine whether it could provide an appropriate placement for Douglas. She found the conditions there to be unsatisfactory and filed a complaint with the California Department of Public Health.

On October 2, 2007, Linda filed a petition with the court for doctor evaluation and placement of Douglas N. The petition indicates Dr. Globus agreed to conduct an evaluation of Douglas. The petition requests that the County provide transportation and supervision of Douglas for that purpose and that it take into consideration any recommendations by Dr. Globus for community placement. The petition also requests that the County prepare a detailed explanation "why [NSH] is the only option they will consider for placement of [Douglas]" and what new services or programs are now offered at NSH that were not available during

Douglas's prior placement. Attached to the petition is a letter from an attorney at Protection & Advocacy Inc. to Linda. The letter notes Douglas's objection to being transferred to a "more restrictive placement" and sets forth a "legal opinion on [Douglas's] rights to a least restrictive environment placement and specialty mental health services under Medi-Cal." The petition requests that the court order the County "to comply and be timely in implementing recommendations of any community placement by Dr. Globus" and provide necessary services to Douglas.

On October 4, 2007, the County of Sacramento filed responding points and authorities in support of its position that Douglas be placed in a locked facility. That document details the County's multiple attempts at community placement for Douglas and the reasons those placements failed. The document further explains the County's determination, based on the recommendations of "psychiatric professionals," that Douglas be at the highest level of placement due not only to his issues and behaviors, but also to the number of locked facilities denying him admission (i.e., Douglas "has been denied at every locked facility available near the Sacramento region"). Noting that SCMHTC is a "short-term crisis center" and not a treatment facility, the County concluded the least restrictive alternative placement to promote treatment and protect Douglas and the public is a "secure, locked setting, with a highly professional staff." Given the denial of admission by all local facilities,

the County concluded that the only facility meeting that requirement was NSH.

On November 26, 2007, Linda filed a lengthy response to the County's points and authorities, disputing the County's representations and stating her opposition to placement at NSH. Attached to the response is correspondence from Linda to various persons and facilities, reports authored by SCMHTC staff and a letter from the Department of Public Health substantiating Linda's complaints regarding NSH.

On November 29, 2007, the court held a hearing on Linda's petition. The court's order reflects that, after hearing testimony from Dr. Glen Xiong and Kelli Weaver, the court ordered Douglas to be placed in NSH and further ordered Linda H. "to sign the consent form for placement in Napa State Hospital." The order also reflects the fact that the preparation of a transcript of the hearing by a certified shorthand reporter was "waived."

Both Linda and Douglas filed timely notices of appeal.

DISCUSSION

Douglas contends his trial counsel's failure to request that the placement hearing be recorded by a certified shorthand reporter "effectively deprived [him] of his appellate rights." He urges there was no conceivable tactical reason for waiving the court reporter and, because the waiver deprived him of any meaningful review, prejudice is presumed. Douglas notes that the parties attempted to reach a settled statement of the record

on appeal, but "stipulated that they are unable to do so." Douglas contends his appeal is not moot even if the conservatorship has expired by the time we render our decision because "it raises issues which are capable of repetition yet avoiding review." (*Conservatorship of Manton* (1985) 39 Cal.3d 645, 647, fn. 1; *Conservatorship of Forsythe* (1987) 192 Cal.App.3d 1406, 1409.)

Linda's counsel filed an opening brief pursuant to *Conservatorship of Ben C.* (2007) 40 Cal.4th 529 (*Ben C.*).³ Linda filed a supplemental brief on her own behalf.⁴ Linda joins Douglas's ineffective assistance of counsel claim. Additionally, Linda contends NSH is not suitable for placement and chronicles her attempts to secure alternative placement. Aside from that which is set forth in Douglas's opening brief, Linda does not provide any independent information, evidence, or argument regarding the preparation of a settled statement of the record on appeal.

"When an appellant desires to present any point which requires consideration of the oral proceedings, he must obtain and file in the appellate court a reporter's transcript, certified by the reporter; or, where a transcript is

³ This is analogous to a *Wende* brief.

⁴ Following the filing of the *Ben C.* brief on Linda's behalf, we granted counsel's request to withdraw and appointed new counsel to represent Linda on appeal. For reasons not apparent to this court, Linda filed the supplemental brief on her own behalf.

unavailable, a settled statement of the oral proceedings prepared by the parties and settled by the judge who heard the matter; or an agreed statement prepared by the parties, consisting of a condensed statement of the relevant proceedings." (*Le Font v. Rankin* (1959) 167 Cal.App.2d 433, 436-437; Cal. Rules of Court, rule 8.137⁵ [formerly rule 7].) A trial judge "is required to certify to a settled statement." (*In re Apperson* (1961) 188 Cal.App.2d 830, 832; cf. *Eisenberg v. Superior Court of Los Angeles County* (1956) 142 Cal.App.2d 12, 13.)

Douglas and Linda both rely on a "joint stipulation prepared by counsel for the conservatee" stating the parties could not agree on a settled statement of the record "because the parties are in disagreement as to what took place at the hearing." The parties' "Stipulation for Agreed/Settled Statement on Appeal" (Stipulation) was filed with the trial court on January 6, 2009. That stipulation states simply that there was no reporter present at the hearing and, "[b]ecause the parties are in disagreement as to what took place at that hearing," the parties stipulate "that it will not be possible to agree on a settled statement of the record on appeal." The clerk of the trial court mailed a copy of the stipulation to this court on January 6, 2009.

⁵ Undesignated rule references are to the California Rules of Court.

The stipulation is deficient in several respects. First, a motion to use a settled statement in lieu of a reporter's transcript must be submitted to the trial court for its consideration. (Rule 8.137(a)(1).) Here, the parties simply submitted a stipulation indicating there would be no settled statement. Next, a settled statement must contain, at the very least, "a condensed narrative of the oral proceedings" sufficient to address the issues on appeal or, in the event the narrative describes less than all of the testimony at the hearing, a statement of the points to be raised on appeal. (Rule 8.137(b)(1) and (2).) Here, instead of providing a narrative of the proceedings consistent with their respective recollections, the parties made no attempt to state their conflicting views of what transpired during the hearing and simply agreed that they could not agree on what took place, bypassing the trial court's ultimate authority to settle the record in the process.

The parties could have created a settled statement despite their apparent disagreement as to what took place at the hearing. "'To determine whether a settled statement is adequate, we consider the issues defendant raises on appeal and the ability of the parties and the trial court to reconstruct the record. [Citation.] To adequately reconstruct trial testimony in a settled statement we consider: (1) whether the trial judge took "detailed notes" [citation]; (2) whether the court is "able to remember" the missing portion of the record

[citation]; and (3) the ability of defendant's counsel to effectively participate in reconstructing the record.

[Citations.]’” (*People v. Cervantes* (2007) 150 Cal.App.4th 1117, 1121.) Douglas was represented at the hearing by his attorney. Linda was present but not represented. Attorney Denis Zilaff was present on behalf of the County. The court’s order states that Kelli Weaver and Dr. Glen Xiong testified at the hearing. The clerk’s transcript contains reports and other documents authored by each of those individuals. We cannot review a reporter’s transcript to determine whether those two witnesses testified consistently with their own writings. However, presumably, everyone present at the hearing (including the trial judge) observed and listened to the testimony of both witnesses and perhaps may even have taken notes. As such, the parties could have participated in the construction of a settled statement despite their differing renditions of what took place. They did not.

The statute governing settled statements does not require that the parties agree on what happened, only that they first seek the court’s approval to utilize a settled statement based on a showing that the oral proceedings were not reported, and then provide the trial court with a narrative of those proceedings as observed by the respective appellants. (Rule 8.137(b).) Because Douglas and Linda did neither, their claim of the lack of a reporter’s transcript, couched as a claim of ineffective assistance of counsel, is not cognizable because

they failed to properly obtain a settled statement. And, because we have no record of the evidence adduced in the trial court, we are unable to review Linda's contention that NSH is not a suitable placement for Douglas.

DISPOSITION

The order is affirmed.

_____, J.
SIMS

We concur:

_____, Acting P. J.
BLEASE

_____, J.
NICHOLSON